No. 09-1350

SUPREME COURT, U.S.
FILED
JUL 15 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CRISELL SEGUIN,

Petitioner,

v.

CIRCUIT COURT OF VIRGINIA,
FAIRFAX COUNTY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR REHEARING

CRISELL SEGUIN, pro se*
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Centreville, Va. 20120-1450
(703) 851-6174
**Petitioner*

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The petitioner respectfully prays that this Court, pursuant to its Rule 44, accept this Petition for Rehearing, and also moves this Court for an order; (1) vacating its order of June 21, 2010, which denied the petition for writ of certiorari filed by the petitioner on May 6, 2010, and (2) granting the petition for writ of certiorari. The grounds for rehearing are stated below.

ALTERNATE JURISDICTIONAL AUTHORITY

The petitioner prays that 42 USC 1332, the "Diversity Statute" be considered as an alternative if neither of the other jurisdictional authorities in the Petition and/or Supplement are acceptable.

The defendant employer (movant) below is a global security and technology company incorporated in Delaware with its main headquarters in Los Angeles, California, with more than 100,000 employees world-wide, with many locations throughout the United States, and is engaged in interstate commerce. The petitioner's (employee's) normal work location is in Chantilly, Virginia, but works on employer products located in many different states and foreign countries.

ALTERNATE QUESTIONS FOR CONSIDERATION

The petitioner prays this Court consider the following alternate questions in lieu of, or in addition to, the questions located in the petitioner's Writ, given the significant change in circumstances which have occurred, as described hereinafter;

QUESTION 1: Is an order compelling arbitration rendered erroneous, thus making it void, if evidence proving beyond a reasonable doubt was recently discovered, that the movant was associated with false material evidence it submitted, and concealment, in obtaining said order; and if so, due to the lack of evidence then to support a 9 USC § 2 claim, is a proposed arbitration clause embedded within the petitioner's at will employment contract, rendered unenforceable as to the petitioner due to attempted coercion and misrepresentation by the movant?

QUESTION 2: Is this Court's interpretation of 9 USC § 1 *et seq.* consistent with congressional intent and if so shouldn't petitioner be ordered to jury trial on the merits instead of arbitration?

REASONS FOR GRANTING REHEARING

I. The Court's Very Recent Decisions in Three Cases have a Direct and Significant Effect on this Case.

a. In *Granite Rock Co. v. Teamsters* this Court stated that; "Arbitration is strictly 'a matter of

consent'," quoting *Volt Information Sciences*, and thus "is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration," *First Options*. It has not been shown by the movant below in the underlying case, in any court, that proper "consent" has ever been given by the petitioner to arbitrate any dispute, in fact, the opposite has been repeatedly demonstrated in several ways by the petitioner in its pleadings and filings.

The *Granite Rock* case is a perfect example of precisely why and how the trial court below in this case failed to meet its responsibility in determining if, or whether, a valid arbitration agreement existed between the parties, given that an arbitration clause had been presented to a court for review, which was, and still is, in contention. (Albeit, as will be seen later in this petition, the movant submitted a false arbitration clause to the trial court for its determination, but due to confidentiality restrictions upon the petitioner, plaintiff below, she could not independently prove that absence of consent, and the falsity of evidence, until recently; at least partially due to the movant's concealment of relevant and material evidence, its denials of misrepresentation, and its lack of desire to correct the evidence in error.)

The "movant" in *Granite Rock* (the company) contended that an arbitration agreement had been reached, but the "employee" (union) rebutted the company's assertions. ***This is exactly the same circumstance which occurred early on in this case below***. The movant produced a document it

contended was legal and in force. This petitioner described a number of reasons why the company was incorrect and that it did not agree.

To resolve this agreement existence dilemma, obviously knowing that 9 USC § 4 requires that "the court shall hear the parties" and "direct the parties to proceed to arbitration in accordance with the terms of the agreement" except "if making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue," in which case "the court shall proceed summarily (quickly) to the trial thereof." (explanation added), the district court in *Granite Rock* directed the parties to a jury trial where a determination was made, obviously realizing that material issues were in dispute, just as they are in the present case below.

The petitioner (plaintiff below) contested early on that no arbitration clause had been agreed upon, and has continued to hold that position to this very day, but the trial court below made the determination itself, without a jury, contrary to both the FAA and Virginia law since the petitioner had demanded a jury trial in her original defamation complaint. See, e.g., FRCP 38(a).

The case below has never gotten past the first stage of judicial development even after three years of judicial actions. The case is in pre-discovery, with a contested interlocutory order. A position that places the case in a "formation dispute" which must be resolved regarding the arbitration clause before the

case can continue. This is also called a "gateway issue" by this Court in several cases. If the petitioner succumbs to arbitration, the costs will be wasted due to her certain judicial protest post-arbitration, which is against the public policy of efficient and effective resolutions.

Justice Sotomayor, with Justice Stevens joining, in a *Granite Rock* dissent stated; "Arbitration, (we) all agree, 'is a matter of contract and a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit.'" (emphasis added) accord *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). And goes on to say; "Before ordering parties to arbitrate, a court must therefore confirm (1) that the parties have an agreement to arbitrate and (2) that the agreement covers their dispute.". The trial court below either did not use, or ignored, the proper process in determining the answers to these critical questions, therefore, the trial court's order compelling arbitration should be reversed and the case remanded for a jury trial on the merits to the trial court with amended complaint, if so advised.

b. Justice Scalia in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ___ 09497 (2010) said; "To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce.". The petitioner provided the trial court below, as well as the Virginia Supreme Court, with several issues related

to the movant's arbitration clause, including misrepresentation.

Therefore, the movant's arbitration clause must be severed from the petitioner's at will employment contract by this Court, and movant enjoined from unilaterally imposing an arbitration clause upon the petitioner ever again.

c. Imposing arbitration upon a party who has not agreed to arbitrate violates the FAA, as demonstrated in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. ___ 081198 (2010) where this Court said, "Imposing {class} arbitration on parties who have not agreed to authorize {class} arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et. seq." (emphasis added, and page references omitted). By the same token, even though this very recent case deals with the class action issue specifically, the Court's general directive regarding forced arbitration comes through simply by blanking the word {class}. The end result is the same.

Because the subject arbitration clause was imposed, thus forced, upon the petitioner, in violation of *Stolt*, without the ability to negotiate or even comment, the trial court's order must be reversed, and since the petitioner has made it clear that she has never agreed to arbitrate anything, the

arbitration clause itself should also be rendered ineffective.

II. A recent National Event, the General Kagan U.S. Supreme Court Senate Confirmation Hearings, Expressed and Clarified Congressional Arbitration Intent which has Heretofore been Unavailable.

The movant's arbitration clause is enforced by 9 USC § 1-16 et. seq. (R.App. 1). The petitioner has never agreed with the clause and has never signed it, in contrast to what many of her peer employees have done. This makes the petitioner's circumstance considerably unique.

The petitioner did not sign an employment agreement when first employed by the movant because the petitioner's legacy company was taken over by the movant.

Federal statute 9 USC § 1 states; " . . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.". As a Virginia at will contract employee, the petitioner fits within the specification of the last phrase. As Senator Franken put it so candidly and succinctly in the recent Supreme Court confirmation hearings for Solicitor General Kagan, "This really should have been a no-brainer because the Federal Arbitration Act of 1925, the law that says which

arbitration agreements should be enforced, specifically exempts, quote, 'contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.'". (R.App. 42).

In *Wards Co. v. Lewis & Debrow,* 210 Va. 751, 173 S.E.2d 861 (1970) the Virginia Supreme Court (VSC) stated; "We have long held that a contract to furnish services or a contract of employment for an indefinite period is, upon reasonable notice, terminable at will by either party.".

The petitioner has agreed to work for a sum of money in providing personal services to the movant, which has been accepted, and for an unspecified period of time; therefore, under Virginia law, the petitioner is an at will contract employee as stated by the trial court and petitioner's counsel in the hearing transcript (R.App. 5), "This is an employment at will.".

Petitioner's position regarding the validity of an arbitration agreement has remained clear throughout; as in her Opposition to Motion to Compel where her counsel stated, "Based on contract law principles, no enforceable arbitration agreement exists." and "Plaintiff's contract of employment with Northrop Grumman ("NG"), which was at will, was silent on the issue of whether disputes would be subject to binding arbitration" (R.App. 8); to the hearing transcript where the trial court stated; "They cannot unilaterally change a written contract.", and her counsel stated, "That is analogous to a contract of adhesion." (R.App. 5), to the trial court's order where

her counsel wrote; "Seen and Excepted to for reasons stated in the Court and in Memoranda of law." (App. 8), to the VSC Petition for Appeal where petitioner's counsel stated; "At no time did Ms. Seguin ever agree, verbally or in writing, to be bound by the arbitration provisions." (R.App. 12), to the Mandamus, "The petitioner denies that she ever agreed to any supposed contract." (R.App. 14), and finally, in her Petition for Certiorari, "Throughout this case the employer has concealed the fact, that as a manager, this employee was exempt from arbitration (App. 24)".

The above, plus explicit respondent waivers refusing to take a position on these issues with this Court (USSCR 15.2), shows demonstrably that no agreement to arbitrate exists, nor has one ever.

Forcing mandatory arbitration on the unwilling petitioner is in violation of the Federal Arbitration Act (FAA).

As Senator Franken indicated; "***Talk about not getting your day in court. Now you can't get your day in court to get your day in court.***" (emphasis added). (R.App. 47). It is clear that Congress never meant for arbitration to be treated in such a manner as to elevate it above the actual laws and the body that created it in the first place, yes, even above the Constitution itself.

If this Court agrees, with Senator Franken, it must reverse the trial court's order compelling arbitration and the movant's arbitration clause must be stricken from the petitioner's at will employment agreement.

III. Recently Discovered Evidence Regarding False Documents Submitted to a Court of Law, and Apparent Concealment of other Relevant Evidence, by the Movant, Material to a Trial Court's Order Compelling Arbitration, Renders said Order Erroneous and therefore, Void.

The movant below requested an order compelling arbitration from the trial court and submitted 2 pleadings each on October 9, and 25, 2007. After realizing it had made errors in the first set, they submitted additional pleadings in further support thereof with corrections, clarifications and additional evidence, the day before the hearing but they were still erroneous. The movant provided the trial court judge with a personal copy of the second set of pleadings by hand delivering them to the judge's chambers (R.App. 15).

Each of the four submitted pleadings contained a declaration under penalty of perjury and were all signed by the same senior Human Resources manager (App. 49-50) who has been an employee of the movant for many years. The second two declarations were "Amended" (R.App. 18). All four declarations referred to the same exhibit entitled "TAB1", containing two separate Corporate Procedures H103, and H103A and some forms.

TAB1 contained two errors, a pagination error (App. 39), and a future-dated form error of "02/07" (R.App. 21) which was more than four months after the proposed agreement was released on September

29, 2006, supposedly mailed to all appropriate employees (App. 37-38).

In the October 25, 2007 pleadings, the movant described in a footnote (R.App. 22), that it had "inadvertently omitted" two other forms (4 pages). The movant also explained that the original TAB1 contents, along with ALL FOUR FORMS, totaling 6 pages, were in a new exhibit labeled as "Exhibit 1", which just happens to contain 31 totals pages (14+ 11+6=31), coincidentally the same number of pages in total indicated on the first sheet in error. The second page was labeled "2 of 14", etc. until "14 of 14" (R.App. 24,25). The second part of the proposed agreement (H103A) was properly labeled "1 of 11" through "11 of 11".

After the hearing granting movant's motion to compel arbitration, 11 days later, the trial court faxed his signed order (App. 7,8) to the parties without a written opinion. It is not known why the trial court delayed so long (11 days). Doing so precluded the petitioner from filing a reconsideration motion.

The case file was apparently held in chambers until at least November 7, 2007. The plaintiff filed its Notice of Appeal to the Virginia Supreme Court with the Clerk of the Fairfax Circuit Court on November 21, 2007. Upon query, one of the associate clerks in the records room indicated to the plaintiff, pursuant to a request to check out the case file for review, that it was unavailable and probably still in chambers, given the recent hearing.

The petitioner notified her employer in various ways, but on November 24, 2007, she submitted several documents to the trial court describing the errors. On December 4, 2007, the petitioner provided a second set of documents to support her first report to the trial court.

From December 24, 2007 through January 8, 2008, the petitioner contacted movant attorney's with a number of "memos for the record" (R.App. 27). Without any confirmation or knowledge, and with what seemed to be a lack of interest in addressing the errors, petitioner formally notified movant of their existence.

The trial court issued a letter on January 21, 2008 notifying the parties of the petitioner's communications, indicating that it had not read the materials (App. 23). The record on appeal was then delivered by the Fairfax Circuit Clerk to the Virginia Supreme Court (VSC) in two sealed envelopes on January 28, 2008.

In its Opposition for Appeal to the VSC submitted on February 21, 2008, without mentioning its errors in the transmitted record, the movant continued to refer to and to rely upon the erroneous evidence in its pleadings (R.App. 34) submitted below.

The petitioner notified the movant's CEO and other top-level executives on August 15, 2008. The movant then, in its Opposition on Appeal dated

August 18, 2008 (App. 46), admitted the errors in a footnote.

The petitioner then filed a petition for writ of mandamus on May 19, 2009 and a follow-up re-hearing, but the VSC rejected both.

Probable intent by the movant, supported by independent evidence, was only suspicioned until on, or about, April 1, 2010 when the petitioner located the *Batchelor* evidence (App. 41-44) showing that the movant either knew, or should have known, that their erroneous evidence submitted on October 9, 2007 to the trial court, when compared to what it had submitted 5 days before on October 4, 2007 to a Maryland Federal District Court, rendered the trial court's order erroneous. The petitioner had not yet notified authorities so she could not inform this Court in her Petition or Supplemental.

Additional verification of probable intent was located on, or about May 16, 2010 in a previously unknown letter between movant attorney's and petitioner's appeal attorney dated August 26, 2008 (R.App. 36).

Therefore, it is requested this Court consider ordering the said trial court order void due to erroneous filings, concealment and other stated reasons.

CONCLUSION

It is clear the movant acted inappropriately which renders void the trial court's order and unenforceable their arbitration clause to the petitioner.

Respectfully submitted,

CRISELL SEGUIN, pro se*
15015 Kamputa Dr.
Centreville, Va. 20120-1450
(703) 851-6174
**Petitioner*

Dated July 15, 2010

REVISED PRAYERS

Petitioner prays that this Court;

1. Reverse the trial court's order and remand her to a jury trial on the merits, with amendments, for her defamation suit and any other claims identified.

2. Order the arbitration clause of the employer's at will contract unenforceable as to the petitioner, and that the employer be ordered not to attempt to forcefully apply said, or other similar, clause against her again.

3. Order that all petitioner's fees and costs since July 16, 2007 be repaid.

4. Order a stay from the July 16, 2007 motion date forward until return to the trial court for proceedings.

CERTIFICATE OF COMPLIANCE

The foregoing petition for rehearing is presented in good faith and not for the purpose of delay. This Petition is restricted to the grounds set out in Rule 44.2.

CRISELL SEGUIN, pro se

AUTHORIZED DOCUMENTS ARE PUBLISHED ONLINE ONLY. VERIFY ANY COPY AGAINST THE ONLINE SYSTEM BEFORE USE.

Arbitration Procedures (Continued)

Any time you spend preparing for or attending the hearing in connection with the arbitration of any claim is not work time and will not be paid for by the Company. However, if you are subpoenaed to appear as a witness in an arbitration where you are not a party, the normal Company rules applicable to paying for time spent as a witness will apply.

Authority Of The Arbitrator

To the fullest extent permitted by law, all matters of procedure, arbitrability of the issues, the location, and the conduct of the hearing will be determined by the arbitrator, consistent with The Arbitration Rules; provided, however, that, unless you and the Company agree otherwise, the arbitration will be held in the city nearest to the work location where you are or were principally assigned.

The arbitrator will have authority to decide any disputes regarding discovery. If any party seeks to notice

more than three depositions in connection with a claim, the parties shall first hold a joint meeting with the arbitrator to discuss discovery issues, limitations, and scheduling.

The arbitrator may bifurcate the proceedings in order to rule first on whether any claim presented is arbitrable. The arbitrator may also bifurcate issues of liability from issues of damages or remedy.

The arbitrator may award any remedy that could be awarded by a court, including, for example, back pay, compensatory damages, preliminary and/or permanent injunctive relief, and/or punitive damages.

Decision of the Arbitrator

The arbitrator shall issue a written opinion stating the essential findings and conclusions upon which the arbitrator's award is based. The arbitrator shall serve the award by mail on you and the Company. The parties will jointly request that the arbitrator issue this written opinion within thirty calendar days after the close of the hearing or briefing.

The decision of the arbitrator will be final and binding upon you and the Company. A reviewing court may only confirm, correct, or vacate an award in

accordance with the standards set forth in the Federal Arbitration Act, 9 U.S.C. §§ 1-16, or applicable state law.

* * *

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CRISELL SEGUIN,	:	
Plaintiff,	:	
-vs-	:	CL NO. 2007-5843
NORTHROP GRUMMAN SYSTEMS CORP., ET AL,	:	
Defendants.	:	

Circuit Courtroom 5C
Fairfax County Courthouse
Fairfax, Virginia

Friday, October 26, 2007

* * *

[PAGE 12] It's a question of her action.

MR. GOULD: Well, I understand she continued to work, but we have –

THE COURT: Not only did she continue to work, but she even used the arbitration procedure, the procedure set out in the new plan.

MR. GOULD: Let me –

THE COURT: She even questioned them at one point, I think.

MR. GOULD: I didn't hear you, sir.

THE COURT: She even questioned then at one point, so I mean, she's operating as an employee

and they said, "If you want to continue to work here, you are going to accept these conditions," and she continues to work there, and then even utilized the grievance procedure set up.

MR. GOULD: That is analogous to a contract of adhesion. She was in a situation –

THE COURT: Oh, no. Give me a case in Virginia that relies upon a contract of adhesion.

MR. GOULD: Well, let me give you the facts. Let me give you the facts.

THE COURT: Give me a case where the Virginia

* * *

[PAGE 16] THE COURT: Exactly. There is an existing written employment contract that they are changing the terms of. They cannot unilaterally change a written contract. That's what they did here. This is an employment at will.

MR. GOULD: That's still a contract. I've cited –

THE COURT: No, no, no, no.

MR. GOULD: Of course it's a contract, Judge.

THE COURT: Well, it is, to some extent, but it's not in that same sense a written contract, Mr. Gould.

MR. GOULD: The terms of the contract, of the employee at will contract, is "I will work for you

and get paid X and you may terminate me at any time."

THE COURT: At any time.

MR. GOULD: "And I may leave at any time."

THE COURT: And that's exactly what they are saying in that memo, isn't it?

MR. GOULD: No.

THE COURT: "You can accept these terms or you are terminated." That's what they are saying which they have a right to do.

MR. GOULD: I don't think they have a right to

* * *

[Page 20] CERTIFICATE OF REPORTER

I, LISE M. WARMUTH, a Certified Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceedings which I thereafter reduced to typewriting; that the foregoing is a true record of said proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

/s/ Lise M. Warmuth
LISE M. WARMUTH, CVR
Certified Verbatim Reporter

VIRGINIA:

IN THE CIRCUIT COURT
FOR FAIRFAX COUNTY

CRISELL SEGUIN,	)	
Plaintiff,	)	
v.	)	**CL-2007-5843**
NORTHROP GRUMMAN SYSTEMS CORPORATION, ET AL.,	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEMURRER OR, IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION

(Filed Oct. 18, 2007)

Plaintiff, by counsel, hereby files her opposition to defendants' demurrer or, in the alternative, motion to compel arbitration.

I. The Motion to Compel Arbitration.

A. Defendants waived their right to contest this Court's jurisdiction.

By filing their demurrer and separate motion to crave oyer, defendants submitted to this Court's jurisdiction and waived their objection to having the Court rather than an arbitrator, adjudicate plaintiff's claim. *Franklin v. Commonwealth*, 27 Va. App. 136, 497

S.E.2d 881 (Va. App. 1998) (Court held " . . . that by making a request for affirmative relief husband entered a

* * *

B. Based on contract law principles, no enforceable arbitration agreement exists.

It is settled that principles of contract law or, in an appropriate case, principles of contract modification, determine whether a duty to arbitrate exists. *Phillips v. Mazyck*, 2007 Va. LEXIS 53, *8 (Va. S. Ct. 2007); *Lawson & Frank, P.C. v. Bettius, et al.*, 66 Va. Cir. 93 (Arlington Cir. Ct. 2004). (A party seeking to impose arbitration based on principles of contract modification is required to prove there was a modification by "clear, unequivocal, and convincing evidence." *Id.*, *98, citing *Reid v. Boyle*, 259 Va. 356, 369-70, 527 S.E.2d 137, 144-45 (2000)). Therefore before defendants can rely on Code 8.01-581.01 they must prove that a contract to arbitrate exists.

Plaintiff's contact of employment with Northrop Grumman ("NG"), which was at will, was silent on the issue of whether disputes would be subject to binding arbitration. See Declaration of Crisell Seguin.[1] The intent of the parties is central to the question of whether the parties agreed to submit to binding arbitration. A party may not be held to have

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[1] [Footnote Omitted In Printing]

consented to a proposal to arbitrate by her silence; put differently, a party's intent to be bound by the terms of a proposed contract may not be inferred from her failure to reject the proposal. *Phillips v. Mazyck*, 2007 Va. LEXIS 53,

* * *

DECLARATION OF CRISELL SEGUIN

1. My name is Crisell Seguin. I make this Declaration based on my personal knowledge of the facts stated herein.

2. When I was first employed by Northrop Grumman there was no discussion or any mention at all of any Dispute Resolution Process ("DRP") or any process that would involve me submitting to binding arbitration in the event of a dispute with the company.

3. I did not learn of the DRP until sometime in 2007, after I began having problems with my immediate supervisor, Mr. Gage.

4. The problems I began having, which amounted to harassment, aggravated my high blood pressure to the point that my medication was increased by my physician and also caused me serious stress. It was important to my health that I try to resolve the problems as quickly as possible.

5. I tried to resolve the problems by communicating with Mr. Gage, but was unable to do so.

6. Once it was clear that I would not be able to resolve the harassment problems by talking with Mr. Gage, the only option I saw available under

the company's policies was to use the informal procedure under what it calls its DRP. I never communicated to the company that I was willing to submit to binding arbitration and I never intended to submit to binding arbitration.

7. I love and need my job and did not want to leave the company because of the problems I was having. The only option I saw to try to straighten matters out was to work through the company's Human Resources people and use the informal procedure available under the DRP.

8. The company did not offer me or, to my knowledge, any other employee any consideration to accept the binding arbitration proposal.

I declare under penalty of perjury that the foregoing is true and correct.

10/15/07 /s/ Crisell Seguin
Date Crisell Seguin

SUPREME COURT OF VIRGINIA

RECORD NO. 080217

CRISELL SEGUIN

Appellant,

v.

NORTHROP GRUMMAN
SYSTEMS CORPORATION
and
JOHN C. GAGE

Appellees.

PETITION FOR APPEAL

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* * *

Grumman's dispute resolution policies and procedures, including a provision that required all disputes relating to their employment be arbitrated. (*Id.*). Northrop

Grumman did not request that the employees sign the agreement or taken any action acknowledging their assent. Northrop Grumman simply stated that continued employment would signify agreement as to the arbitration requirement *id.*). At no time did Ms. Seguin ever agree, verbally or in writing, to be bound by the arbitration provisions.

* * *

VIRGINIA:

IN THE SUPREME COURT at RICHMOND

In Re: CRISELL SEGUIN, Petitioner	)	**VSC No. 080217**
	)	**Circuit No.**
	)	**CL-2007-5843**

PETITION for WRIT of MANDAMUS

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Virginia;

COMES NOW the petitioner, and hereby petitions this Court for a Writ of Mandamus directed to the Honorable Dennis J. Smith, judge of the Fairfax County Virginia Circuit Court, ordering him to stay his order compelling arbitration dated October 26, 2007 pursuant to Virginia Code § 8.01-581.02(A) & (D) and to forthwith convene a trial-by-jury pursuant to § 8.01-336(A) and the Constitution of Virginia, Article I, Section 11, in the above styled matter to determine whether there existed an arbitration agreement between the parties prior to May 17, 2007. Upon said Jury

* * *

NATURE OF THE CASE

Crisell Seguin, the Petitioner, filed a defamation suit against her employer (Northrop Grumman Systems Corporation) and her boss (John C. Gage), collectively referred to in this petition as "employer" due to alleged false statements made in her 2006 annual performance review. Shortly thereafter her

employer filed a motion to compel arbitration insisting that it had an agreement with the petitioner to resolve all employment related disputes by arbitration instead of in a court of law. The petitioner denies she ever agreed to any supposed contract. At a hearing regarding the motion to compel, the trial court ordered arbitration without a jury trial even though material facts were in dispute and the petitioner had demanded a trial-by-jury in her original complaint, but did not honor the petitioner's request for a stay. Subsequently, the petitioner appealed to this Court requesting relief. Additional evidence became available during the appeal

* * *

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Morgan Lewis
COUNSELORS AT LAW

Karen E. Gray
202.739.5334
kgray@morganlewis.com

October 25, 2007

BY HAND DELIVERY

Chief Judge Dennis Smith
Judge's Chambers – 5th Floor
Circuit Court of Fairfax County, Virginia
Jennings Building Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030

Re: Seguin v. Northrop Grumman Systems Corporation, et al.: Civil Action No. CL-2007-5843

Dear Chief Judge Smith:

Enclosed please find a courtesy copy of documents filed today in the above-referenced case:

- Defendants' Reply in Further Support of Their Demurrer or, in the Alternative, Motion to Compel Arbitration with attached exhibits.
- Defendants' Reply in Further Support of Their Motion to Crave Oyer with attached exhibit.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your assistance in this matter.

Sincerely,

/s/ Karen E. Gray
Karen E. Gray

Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October 2007, a true and correct copy of the foregoing Defendants' Reply to Plaintiff's Opposition to Demurrer or, in the Alternative, Motion to Compel Arbitration was sent via hand delivery to:

Jack L. Gould, Esq.
10615 Judicial Drive, Suite 102
Fairfax, VA 22030
Attorney for Plaintiff

/s/ Karen E. Gray
Karen E. Gray

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October 2007, a true and correct copy of the foregoing Defendants' Reply in Further Support of Their Motion to Crave Oyer and Attached Exhibit was sent via hand delivery to:

Jack L. Gould, Esq.
10615 Judicial Drive, Suite 102
Fairfax, VA 22030
Attorney for Plaintiff

/s/ Karen E. Gray
Karen E. Gray

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

CRISELL SEGUIN, Plaintiff, v. NORTHROP GRUMMAN SYSTEMS CORPORATION, *et al.*, Defendants.	CL-2007-5843

AMENDED DECLARATION OF PATRICIA WOLF

I, Patricia Wolf, having personal knowledge of the facts set forth below, do hereby declare:

1. I hold the position of Director of Compliance and Employee Relations at Northrop Grumman Information Technology ("Northrop Grumman" or "the Company") and have held this position since January 2002.

2. Northrop Gumman Corporation's Dispute Resolution Process ("DRP") was distributed to all Company employees via electronic mail on February 9, 2004, and again on May 10, 2004.

3. The DRP was amended on September 15, 2006. On September 29, 2006, the amended version was distributed to Crisell Seguin and all other Company employees via electronic mail and first class U.S. mail. At all times while it has been in effect, it

has also been posted on the Northrop Grumman intranet website.

4. Tab 1 of Defendants' Memorandum of Points and Authorities in Support of Their Demurrer, or in the Alternative, Motion to Compel Arbitration contains a true and correct copy of the documents relating to the DRP that were distributed to Crisell via electronic and first class U.S. mail, consisting of Corporate Procedure No. H103 (Dispute Resolution Process), Corporate Procedure H103A (Employee Mediation/Binding Arbitration Program), and a cover memorandum from Ian Ziskin, Chief Human Resources and Administrative Officer.

5. Tab 1 of Defendants' Reply in Further Support of their Demurrer or, in the Alternative, Motion to Compel Arbitration contains a true and correct copy of the relevant portion of the Proof of Mailing evidencing the fact that the revised DRP was mailed to Ms. Seguin's home address on September 29, 2006. Home addresses of the other individuals listed have been redacted. This document is retained in the Company's records in the ordinary course of business.

6. Tab 2 of Defendants' Reply in Further Support of their Demurrer or, in the Alternative, Motion to Compel Arbitration contains a true and correct copy of Northrop Grumman's Delivery Receipt Tracking System evidencing the fact that Ms. Seguin received an electronic copy of the updated Dispute Resolution Process (Company Announcement) on

September 29, 2006 at 8:43 PM. This document is retained in the Company's records in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 25, 2007 /s/ Patricia A. Wolf
Patricia Wolf

NORTHROP GRUMMAN

NOTICE OF APPEAL TO THE MANAGEMENT APPEALS COMMITTEE
Form C-605 (2-07)*

To be filed with Human Resources to initiate an appeal to the Management Appeals Committee.	DATE

NAME	DEPARTMENT
TITLE	
SUPERVISOR NAME	DATE OF ADMINISTRATIVE OFFICER REVIEW.
WHAT EMPLOYMENT ACTION DO YOU FEEL VIOLATED COMPANY POLICY OR WHAT UNLAWFUL CONDUCT DO YOU CLAIM OCCURRED?	
OUTCOME OF ADMINISTRATIVE OFFICER REVIEW	
REASON FOR APPEAL	
REQUESTED REMEDY	

SIGNATURE	DATE
RECEIVED BY HUMAN RESOURCES	DATE RECEIVED

* * *

recover damages for defamation allegedly committed by Defendants in the course and scope of her employment. This claim, however, is subject to a mandatory, binding arbitration agreement: as set forth in Northrop Grumman's Dispute Resolution Process ("DRP"). The DRP and Plaintiff's efforts to invoke it prior to filing her lawsuit are therefore material and necessary to her claims. Plaintiff should not be permitted to avoid this Court's consideration of the arbitrability of her claims: simply because she chose not to disclose the DRP's applicability in her Complaint. Accordingly, Defendants request that the Court treat the DRP, Plaintiff's written efforts to invoke it, and evidence of the DRP's delivery as though they were a part of Plaintiff's Complaint.[1]

WHEREFORE Defendants respectfully request that their Motion to Crave Oyer be granted and that the Court consider the Dispute Resolution Process and electronic mail messages from Plaintiff attached as exhibits to Defendants' Memorandum of Points and Authorities in Support of Their Demurrer or, in the Alternative, Motion to Compel Arbitration.

---

[1] Defendants' inadvertently omitted forms C-606 and C-607 to Corporate Procedure H103A (Employee Mediation/Binding Arbitration Program) in Exhibit 1 to Defendants' Memorandum of Points and Authorities in Support of their Demurrer or, in the Alternative, Motion to Compel Arbitration and the Motion to Crave Oyer. Defendants attach the full DRP including all Forms to this Reply as Exhibit 1.

Defendants further request this Court consider the Amended Declaration of Patricia Wolf, Proof of Mailing, and Northrop Grumman's Delivery Receipts Tracking System for September 29, 2006 attached as exhibits to Defendants' Reply in Further Support of Their Demurrer or, in the Alternative, Motion to Compel Arbitration.

* * *

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* * *

AUTHORIZED DOCUMENTS ARE PUBLISHED ONLINE ONLY. VERIFY ANY COPY AGAINST THE ONLINE SYSTEM BEFORE USE.

Overview, Continued

Forms The following Corporate forms may be used in the Dispute Resolution Process:

- *Form C-604,* Formal Request for Administrative Officer Review
- *Form C-605,* Notice of Appeal to the Management Appeals Committee
- *Form C-606,* Request For Mediation
- *Form C-607,* Demand For Arbitration

General Northrop Grumman values employees as its most important resource and places a high priority on ensuring fair and consistent treatment (see *CP No. H1,* Human Resources). The company is committed to creating an environment of mutual trust and professionalism where problems can be fairly resolved through an interactive process that encourages better communication at all levels.

Employees are encouraged to work with their management to achieve resolution

concerning any problems impacting the employee's work. Employees needing additional assistance should contact their Human Resources representative for advice and assistance regarding any work-related issues.

Continued on next page

* * *

AUTHORIZED DOCUMENTS ARE PUBLISHED ONLINE ONLY. VERIFY ANY COPY AGAINST THE ONLINE SYSTEM BEFORE USE.

Arbitration

In This Section

This section provides a general overview of the arbitration process.

Process

The table below provides a general overview of the arbitration procedure. Refer to *CO No. H103A* for more details.

Responsibility/ Step	Action
Employee; Law Department 1	Deliver a Demand For Arbitration to the other party pursuant

	to the procedures set forth in *CO No. H103A*. *Note*: *Form C-607*, Demand for Arbitration, may be used for this purpose.
2	Choose an arbitrator pursuant to the procedures set forth in *CO No. H103A*.
3	Arbitrate the claim pursuant to the procedures set forth in *CO No. H103A*.

Issued by: Corporate Command Media
(90/132/CC)

Second Follow-up to MEMORANDUM FOR THE RECORD

Wednesday, January 2, 2008

Karen E. Gray, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-3000, (202) 739-3001 fax,
kgray@morganlewis.com

Subject: Request for Information Regarding Your October 9 and 25, 2007 Pleadings Accuracy, etc.

RE: Fairfax County Circuit Court Case No. CL-2007-5843

via prepaid USPS certified mail with return receipt and fax, with a fax copy to James J. Kelley, Esq. of the same law firm

Dear Karen;

Since I have not yet received the information that I requested last Wednesday of you and Mr. Kelley, I feel that it is now critical to begin addressing the above subject. In that vein, I provide the following. If you see anything differently, please let me know immediately, otherwise I must assume that you agree.

I believe, according to your filings:

#1 – Defendant subject documents originally filed on October 9, 2007 and supplemented on October 25, 2007 with the Fairfax County Clerk of the Circuit Court, in the above referenced case, relative to a

Motion Hearing held on October 26, 2007, apparently contained material errors.

#2 – All of the subject documents (4 in total) that you caused to be filed, were signed and certified by you as Defendants Counsel. You copied the Judge on two, and the Plaintiffs Counsel on all four.

#3 – All of the Declarations and Amended Declarations within the subject filed documents were signed and dated under penalty of perjury by one, and the same, Defendant Company employee.

#4 – In both of the original documents filed on October 9, 2007, an inconsistency exists between what motion argument refers to as the location of the DRP (Ex. 1) verses [sic] what ALL of the declarations refer to as the DRP's location (Tab 1), which may have possibly caused some confusion.

#5 – In your footnote of the October 25, 2007 Motion to Crave Oyer you indicate that the DRP is located in "Exhibit 1" of the original documents filed on October 9, 2007. It appears that this tag (Exhibit 1) is synonymous with the tags "Ex. 1" and "Tab 1". It also appears that all 3 tags are intended to point to the same relative location which is the first included attachment to both of your original documents filed on October 9, 2007, representing the official DRP, located immediately following your certification signature.

#6 – The Defendant company claims it mailed the same DRP to all employees that was distributed to the Plaintiff on September 29, 2006, which would

include the employee who signed all of the Declarations and Amended Declarations in this case.

#7 – The Defendant company claims it emailed the same DRP to all employees that was distributed to the Plaintiff on September 29, 2006, which would include the employee who signed all of the Declarations and Amended Declarations in this case.

#8 – An employee is not paid for time spent during, or preparing for, the arbitration process even if forced to arbitrate by the company, according to H103A, regardless of who is found at fault during the arbitration proceeding, unless subpoenaed.

#9 – An ex parte letter, and two flings, which included in their titles; "in Further Support of", were hand delivered to the Hearing Judge late in the afternoon of October 25, 2007 (the day before the hearing), one of which included an Amended Declaration, apparently still referencing the unauthorized H103 cover page containing "1 of 31".

#10 – All of the Terms & Conditions are not stated in the DRP, vis-á-vis page 3 of H103A states; "any violation of applicable federal, state, or local law, . . . ". The term "applicable" is not well defined even though that word is a significant and contract defining Term.

#11 – Under circumstances described in H103A, the company is required to arbitrate all issues demanded by employees.

#12 – There exists an uncorrected, unauthorized cover page designated as page "1 of 31" in multiple

copies of the Dispute Resolution Process (H103) filed by the Defendants.

#13 – The original Defendant Declaration contained a date of "September 29, 2006" in Paragraph 4 that was absent in the Amended Declaration, which contains no explanation why it was removed.

#14 – The Plaintiffs designation was changed from "Ms. Seguin" to "Crisell" in Paragraph 4 in the Amended Declaration.

#15 – An employee automatically invokes the DRP, according to the chart on page 4 of H103, by making a complaint to HR, whether they intend to invoke that process or not.

#16 – The C-605 DRP form, in all of your filings, contains a date of "2-07" which was more than four months after the September 29, 2006 DRP distribution date.

#17 – H103A requires employees to arbitrate crimes against them by other employees, related to work circumstances, due to the lack of specificity in the DRP.

* * *

Request for clarifications, and other related items:

#101 – What exactly constitutes the complete and total Defendant company's arbitration agreement?

With your corrections and some of the issues presented here, it is now unclear just exactly what that agreement is, and just exactly what it's contents are.

#102 – Have you verified the contents of both the mail and email DRP with your corrected DRP in Exhibit 1?

#103 – Have you determined if more than one DRP was distributed per mode, or if either may have had errors in them?

#104 – Does the Defendant company provide formal DRP training for employees?

#105 – Corporate Procedure H103 entitled "Dispute Resolution Process", like any other of the Defendant company's procedures, requires employee compliance, by dictate.

#106 – Corporate Procedure H103A is a Program by title but it is categorized as a Corporate Procedure, which insinuates that its compliance is required with, or without, a valid and enforceable contract.

#107 – You stated in a phone message that you left for me that you did not know what I was referring to regarding the accuracy of your subject filings implying that the Defendant Company had not yet informed you, as of December 28, 2007, of the apparent errors which still exist in your filed court documents, which you apparently had also failed to identify.

#108 – Two documents in the Defendant's filings, containing multiple apparent errors, were transmitted on October 9, 2007 by electronic mail, apparently from the Washington, D.C. law office of the Defendant's Counsel, to the Plaintiff's Counsel whose principal office is in Fairfax, Virginia.

#109 – On October 26, 2007 you signed an ORDER which stated, in part; "The Court finding that no wrongdoing was committed by any party by filing any documents . . . ", indicating that you had both "Seen and Agreed" as "Counsel for Defendant(s)" with that order.

#110 – There is no record in the October 26, 2007 hearing transcript showing that "wrongdoing" was discussed.

#111 – The company's public web reporting system (OpenLine®) is managed and administered by HR. By using it, an employee may file a complaint which can eventually lead to arbitration.

* * *

Much time has already passed, so I hope to be hearing from you very soon, one way or the other.

/s/ Crisell Seguin, Pro Se
Crisell Seguin, pro se
15015 Kamputa Dr.
Centreville, Va. 20120-1450
(703) 851-6174, (703) 631-1253 fax,
email: seguincr@verizon.net

IN THE SUPREME COURT OF VIRGINIA

Case No. 080217

Crisell Seguin,

Plaintiff-,

v.

Northrop Grumman Systems Corporation, et al.,

Defendants-Appellees

NORTHROP GRUMMAN SYSTEMS CORPORATION AND JOHN C. GAGE'S REVISED OPPOSITION TO CRISELL SEGUIN'S PETITION FOR APPEAL

James J. Kelley (VA Bar No. 13869)
Karen E. Gray (VA Bar No. 47747)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000
(202) 739-3001 (Fax)

Attorneys for Northrop Grumman Systems Corporation and John C. Gage

* * *

30, 2004, as amended on September 15, 2006. Except in very limited circumstances not applicable here, the DRP requires Northrop Grumman employees, as well as the Company, to resolve all employment-related disputes through mandatory binding arbitration. (Defs.' Mem., Ex. 1).[1]

Northrop Grumman mailed Ms. Seguin the DRP on September 29, 2006. (*See* Defs.' Reply, Exs. 1 and 3)[2]. Ms. Seguin also received notice of the DRP by electronic mail on February 9, 2004, May 10, 2004, and September 29, 2006. (*See* Defs.' Reply, Exs. 2 and 3 ¶ 6). In addition, since its inception in 2004, the DRP has been available to all employees on Northrop Grumman's intranet website. (*See* Defs.' Reply, at 3). Ms. Seguin admits that she was aware of the DRP in 2007 prior to filing her lawsuit. (*See* Pl. Opp. at 3, Decl. of Crisell Seguin ¶ 3; Defs.' Mem., Ex. 4).[3]

Northrop Grumman's DRP states, "[b]y accepting or continuing employment on or after 1 November 2006, all covered employees agree to submit any

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[1] Defendants Northrop Grumman Systems Corporation and John C. Gage's Memorandum of Points and Authorities in Support of Their Demurrer or in the Alternative, Motion to Compel Arbitration (hereinafter "Defs.' Mem.").

[2] Defendants' Reply in Further Support of Their Demurrer, in the Alternative, Motion to Compel Arbitration (hereinafter "Defs.' Reply").

[3] Plaintiff's Opposition to Demurrer or, in the Alternative, Motion to Compel Arbitration (hereinafter "Pl. Opp.").

covered disputes to binding arbitration, rather than to have such disputes heard by a court or jury." (Defs.' Mem., Ex. 1 at 3).[4] Ms. Seguin continued her employment with Northrop Grumman after November 1, 2006, and after she was aware of the DRP in 2007. (*See* Compl. ¶¶ 1, 6; Petition for Appeal at 5). Indeed, Ms. Seguin remains employed by Northrop Grumman.

In a memorandum to Northrop Grumman Human Resources dated March 6, 2007, Ms Seguin confirmed her awareness of the DRP. In that memorandum, she specifically asked "[m]ay

* * *

[4] Similar language appears in the September 29, 2006 cover letter. (*See* Defs.' Mem" Ex. 1, at 1; Petition for Appeal, attachment).

LR
LECLAIRRYAN

Date: May 17, 2010	**Fax Number**	**Phone Number**
To: Crisell Seguin	703-631-1253	

Number of pages including cover sheet:

		Fax Number	**Phone Number**
From:	Alicia B. Higgs	804.783.2294	804.916.7137
Emp. No.		**Client/Matter No.**	

Remarks: Attached is a fax dated August 26, 2008.

NOTE: The information contained in this facsimile message may be attorney privileged and confidential information, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the address below via the United States Postal Service. Thank you.

FACSIMILE

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August 26, 2008

VIA FACSIMILE AND MAIL

William H. Shewmake
LeClairRyan
Riverfront Plaza, East Tower
951 E. Byrd Street
Eighth Floor
Richmond, VA 23219

Re: *Seguin v. Northrop Grumman Systems Corporation., et al.*

Dear Will:

I am writing with regard to an email dated August 16, 2008 that was sent by your client, Crisell Seguin, to the Chief Executive Officer of Northrop Grumman (Dr. Ronald Sugar) and other senior executives regarding alleged misrepresentations to the Supreme Court of Virginia in this litigation. Please be advised that this is not the first time that Ms. Seguin has contacted Company personnel regarding her litigation, and the Company continues to believe that such

communications should he made between counsel. Nevertheless, this letter constitute the Company's response to the August 16th email, which we would request be provided directly to her. In short, there have been no misrepresentations, and the Company is committed to insuring that no false, material information is knowingly submitted in any legal proceeding.

First, Ms. Seguin believes that the copy of the Dispute Resolution Process (DRP) that was filed by the Company with the court is different from the copy that she received from the Company in September 2006. In particular, she has pointed out that the Corporate Procedure H103 that was submitted to the court has "Page 1 of 31" on the first page, while the Corporate Procedure H103 that she received has "Page 1 of 14" on the first page. She should be assured that this was only a pagination error that occurred when the document was taken from Command Media and converted to.pdf format The substance of the text of H103 that was submitted to the court was identical to the text that she received. Regardless, we noted the pagination error in our Virginia Supreme Court brief, even though the pagination issue is not relevant to the issues that the court is deciding.

Second, it appears that she is upset that a copy of Form C-605 was submitted to the court even though she did not receive C-605 (which has a February 2007 date on it) in September 2006. The Company included C 605 and the other forms referenced in H-103 so

that the court would have a complete copy of the applicable DRP, and it does not contend that she received C-605 in September 2006. To avoid any misunderstanding, we have made clear in our court filing that, while she received H-103A and H-103A, she did not receive the referenced forms in September 2006, Again, the inclusion of C-605 is irrelevant to the issues that the Virginia Supreme Court is deciding.

I trust that this addresses the issues raised in her email. Please do not hesitate to contact me if you wish to discuss this matter further.

Sincerely,

/s/ Karen E. Gray
Karen E. Gray

Kagan Confirmation Hearing Transcript

Compiled July 3, 2010 From Files
Made Available by The Washington Post

June 28, 29, and 30, 2010 Transcript Text

* * *

FEINGOLD: All right. I want to talk with you now about the issue of forced arbitration, which I've been working on for about a decade. More and more powerful economic interests are forcing consumers and employees to bring their disputes not to the courts, but to a parallel legal system where the rule of law barely applies and where the outcome I think is stacked against them.

A century ago, Congress passed the Federal Arbitration Act to allow parties who wanted to take their disputes to arbitration to enforce the results of the arbitration in court. In the last several decades, however, the Supreme Court has twisted this law to allow banks and mortgage companies, health care providers, big agribusinesses and others to enforce so-called "take it or leave it" contracts that force people to use arbitration even if they don't want to.

I think that's wrong and Congress needs to change it. And just this past week in the Rent-A-Center case, the court held that in most cases where a claim is made that enforcement of an arbitration clause would be unconscionable, it would be the arbitrator – the arbitrator – who gets to rule on that issue.

Do you understand why the Supreme Court's decisions in favor of powerful interests who want to

force consumers and employees into arbitration against their will are so troubling to those who believe that our courts must continue to be available to enforce consumer protection, employment discrimination, and other laws written to protect the powerless from misconduct by the powerful?

KAGAN: Senator Feingold, I have not had an opportunity to read that case. It was not one that the solicitor general's office participated in. And I don't have a view of it or much knowledge about it.

I think that in this – in that case, the Supreme Court was interpreting a congressional statute, and this is another of the areas where Congress does indeed get to state the rules. So to the extent Congress thinks the court got it wrong in that case or in any other regarding arbitration, I think it's appropriate, and the court would and should respect what Congress does.

* * *

FRANKEN: Thank you, Mr. Chairman.

General Kagan, I really liked something you said yesterday in your conversation with Senator Kyl. You said that "one of the glorious things about courts is they provide a level playing field in all circumstances, and that we need to make sure that every single person gets the opportunity to come before the court and gets the opportunity to make his best case and gets a fair shake."

I want to discuss something that is denying more and more working Americans that precious day in

court – that fair shake, and that's mandatory arbitration. Now, arbitration has its place. I'm talking about mandatory arbitration.

Chances are if you have a cell phone or a credit card or if you work, you're likely to have signed a contract with a mandatory arbitration clause. These clauses basically say if we violate your fights, you can't take us to court. You have to take it to an arbitrator. But then the fine print essentially says an arbitrator that we pay who depends on us for work and who makes decisions in secret.

So a lot of people are denying their opportunity to come before the court. Unfortunately, we've seen a series of decisions from the Supreme Court that have made it even harder for people to get that fair shake, as you put it.

In 2001, in a case called Circuit City, the court was asked to decide whether workers' employment – employment contracts could be subject to mandatory arbitration. This really should have been a no-brainer because the Federal Arbitration Act of 1925, the law that says which arbitration agreements should be enforced, specifically exempts, quote, "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."

Organized labor had asked for this specific language to be included to make sure the act would not apply to workers' employment contracts. In fact, then-Commerce Secretary Herbert Hoover said

during a Senate hearing, quote, "If the objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating that nothing herein contained shall apply to the contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate commerce."

Secretary Hoover was saying that if Congress wanted to make clear that the Federal Arbitration Act did not apply to employment contracts, Congress should put this language in the statute. So Congress put the language in the statute. But when Justice Kennedy wrote the majority opinion in Circuit City, he ignored the history. He wrote, and I quote, "We need not assess the legislative history of the exclusion provision." Let me repeat that: "We need not assess the legislative history of the exclusion provision."

And based on a strained reading of the law, he decided that the exception only applied to workers in the transportation business, not any class of workers. This means that instead of all workers getting their day in court in Congress, like Congress clearly intended, only transportation workers would get it, and that excludes the vast majority of American workers.

General Kagan, I really disagree with this case and the way the court ignored Congress' intent. That's why I was glad to hear your response to one of Senator Schumer's questions about how the court should interpret statutes. You said that among other

things, quote, "I think a judge should look to the history of the statute in order to determine Congress' will."

General Kagan, we spend a he lot of time in hearings and on the floor debating legislation. How much weight do you think a judge should give to the deliberations of Congress and the reasons why we passed a law in the first place?

KAGAN: Well, Senator Franken, the most important thing in interpreting any statute – in fact, the only thing that matters in interpreting any statute – is Congress' intent. Congress gets to make the laws under Article One of the Constitution. And what the court should be doing in applying those laws is trying to figure out what Congress meant and how Congress wanted the laws to be applied. That is the only thing that the court should be doing.

Now, sometimes that can be a difficult task. New situations come up. The statutory language – it's not clear how the statutory language applies to those new situations, or sometimes Congress might simply not have thought of particular situations. Language is by necessity inexact. And so there are going to be cases which . . .

FRANKEN: Do you agree with Justice Kennedy, we need not assess the legislative history of something?

KAGAN: Well, I would – I would say this. I would say where the text is clear, the court should

go with the text. Where the text clearly covers some situation, the court should do that. The court should not rewrite the law.

FRANKEN: But shouldn't the court assess that – make an assessment there?

KAGAN: Well, I think if the text is clear, Congress should not – the court should not rewrite the law. But where the text is ambiguous, which often happens . . .

FRANKEN: And wouldn't you have to assess whether it's ambiguous?

KAGAN: Yes. I mean, the first step is . . .

FRANKEN: So what Justice Kennedy said doesn't stand up to that, does it?

Let me – let me move on on that. We in Congress, we want to make sure, all of us, that our intentions are clear so that 75 years from now the Supreme Court doesn't just ignore the purpose behind the laws we are passing. How can we do that? How do we do that? How do we do that? How do we make it clear to future justices?

KAGAN: Well, the courts surely would be helped if Congress spoke as precisely and exactly and as comprehensively as it could in all situations.

KAGAN: You know, there – there are some instances where the – the court just has legitimate difficulty trying to figure out what Congress intended and where judges, all of whom agree that what they

should be doing is doing what Congress intended, have difficulty determining that or disagree about what that means.

And – and certainly to the extent that Congress can make its intentions clear in legislation and can specifically spell out how it intends for the law to operate, Congress ought to do so. And, of course, you know, to the extent that the court gets something wrong with respect to a statute, and this has happened, you know, many times in – in recent years and in prior years, as well – to the – to the extent that the court gets something wrong, of course Congress can come back and change it, and make clear that the court got it wrong, and – and also use it as an opportunity even to make clear its intentions with respect to a general area of law.

FRANKEN: OK. It's hard to do 78 years from now, but we'll try.

Circuit City was a Rehnquist court decision. Just last week, the Roberts court did Circuit City one better in helping employers keep their workers out of court and into arbitration. It happened in a case called Rent-A-Center v. Jackson, which Senator Feingold noted yesterday.

Rent-A-Center had 21,000 workers and hundreds of millions of dollars in annual profits. It also forces its workers to sign a mandatory arbitration agreement as a condition of employment.

Antonio Jackson, an African-American account manager in Nevada, had been working for Rent-A-Center for years, but he was frustrated because he watched his company pass him over for promotions again and again. Instead, they promoted workers who had less experience and who weren't black.

Although Jackson signed an employment contract agreeing to arbitrate all employment claims, this seemed blatantly unfair, and he sued Rent-A-Center. But the company argued that only the arbitrator could decide whether the arbitration clause was unfair. Let me repeat that: Rent-A-Center argued that only the arbitrator could decide whether the arbitration clause was unfair.

Last week, the Roberts court sided with Rent-A-Center. Talk about not getting your day in court. Now you can't get your day in court to get your day in court.

Now, General Kagan, I know I probably can't ask you about whether you think this case – well, I can ask you, but you won't answer – whether this case was correctly decided, but I would like to ask, do you still agree with what you said yesterday to Senator Kyl, that one of the glorious things about courts is that they provide a level playing field in all circumstances and that we need to make sure that every single person gets the opportunity to come before the court and gets the opportunity to make his best case and gets a fair shake?

KAGAN: Well, I – I – I do agree with that very strongly, Senator Franken. And if I might, if I might just return to this question of statutory interpretation that you started off with, because I did want to make clear that, when a text is ambiguous, which, you know, frequently happens, which frequently happens, then I think that the job of the courts is to use whatever evidence is at hand to understand Congress's intent, and that includes exploration of Congress's purpose by way of looking at the structure of the statute, by way of looking at the title of the statute, by way of looking at when the statute was enacted, and in what circumstances, and by way of looking at legislative history.

Now, I think courts have to be careful about looking at legislative history and make sure that what they're looking to is – is reliable, but courts should not at all exclude signs of congressional intent and should – should – should really search hard for congressional intent when the text of the statute itself is unclear.

FRANKEN: Good. Then I think you and I agree that Justice Kennedy may have been in error when he said that – that the court doesn't have to assess the legislative history.

KAGAN: Well, I suspect that – I – I don't know the case very well. I suspect that Justice Kennedy may have meant that he thought that the text was clear and, therefore, the legislative history

was not something that should appropriately be explored, but I'm just guessing on that.

FRANKEN: OK. I think you're guessing wrong.

KAGAN: OK.

(LAUGHTER)

FRANKEN: General Kagan, you've – you've gotten a lot of questions about . . .

KAGAN: It's not the first time in my life.

FRANKEN: And nor the last. We all guess wrong.

* * *

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Questions or comments?
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